eschewed limitations thereon because of constitutional concerns. Similarly, despite Congress' mandate, the Commission has not been able to craft constitutionally-acceptable restrictions on indecent programming.[50/]

If the constitution does not permit content-based restrictions on violent or indecent programming, where there is at least a colorable claim of societal harm, it clearly forbids such limitations on home shopping programming, where there is absolutely no basis for a similar claim. Home shopping programming is not violent. It is not sexually explicit. Rather, it is a unique mix of entertainment, information and sales presentations. That it is distinctly different from conventional commercial television programming[51/] does not mean that it should be subject to exceptional regulation.

Neither Congress, the Commission nor home shopping's vocal critics have ever articulated any specific harm associated with the broadcast advertisement of legitimate goods and services. In fact, they have made no

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49/ (...continued)
House Committee on the Judiciary (December 15, 1992) Serial No. 115.

50/ See Action for Children's Television v. FCC, No. 93-1092 (D.C. Cir. Nov. 23, 1993).

51/ See, e.g., "In Dirty Laundryland," The New York Times, October 10, 1993, Sec. 9, p.1, for a description of the content of standard daytime television programming.

showing whatever of any social damage flowing from broadcast of advertising material or of home shopping programming. One looks in vain for any scholarly or empirical demonstration that commercial matter is so detrimental to society that it requires or would legally support extraordinary restrictive federal regulation.[52/]

Home shopping's critics have never demonstrated anything other than their own private preference for different categories of "better" programming to support their arguments that home shopping programming is somehow less desirable and therefore should be subject to more regulation than other types of broadcast programming. The Commission, however, has frequently reiterated that it cannot base regulatory decisions on determinations as to what is a "good" or a "bad" program[53/] -- yet that is

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52/ Indeed, the Commission has recognized that broadcast of commercial matter serves an important societal interest by informing the public concerning goods and services available for sale. Commercial Advertising Standards, supra; see Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 765 (1976) ["So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be decided through numerous private decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable."].

53/ See, e.g., Commission en banc Programming Inquiry, 44 FCC at 2308 [the Commission "may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program."]; Radio Akron, Inc., 62 FCC 2d 987, 995 (1977); (continued...)

precisely what commercial reregulation would represent. Reregulation on the theory that government must discourage content related to sales because it is somehow less desirable than other types of entertainment programming[54/] would be precisely the type of prohibited content-based program regulation which the Commission has heretofore avoided.

Congress and the Commission have been reluctant to regulate broadcast speech even when there is a showing of harm (e.g., children's programming, violence, obscenity.) That reluctance must become complete forbearance in the absence of any such showing: there is no governmental interest in restricting broadcast home shopping.

Home Shopping Programming Serves an Affirmative Public Interest Purpose

The need for a compelling governmental interest to support restrictions on home shopping formats is magnified by the fact that such programming's availability provides substantial public interest benefits that such an interest would have to overcome. Based upon voluminous submissions

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53/ (...continued)
Television Wisconsin, Inc., 58 FCC 2d 1232, 1235-1236 (1975); KSD/KSD-TV, Inc., 61 FCC 2d 504, 511 (1976).

54/ Perhaps the concern is that home shopping encourages materialism, which is not a socially desirable result. Such a concern cannot be constitutionally justified. Moreover, it is misplaced: studies suggest that home shoppers are less, rather than more, materialistic than non-shoppers. WSL Report at 18.

in MM Docket No. 93-8, the Commission found that televised home shopping enables persons to shop who may not be able or want to leave their homes to do so, concluding "...that home shopping stations provide an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[55/] Even home shopping's most vociferous critics have not challenged this determination.

Nor have they taken issue with the fact that the availability of a home shopping format has made the most tangible contribution to date to minority television station ownership. The record in MM Docket No. 93-8 includes substantial, undisputed evidence of home shopping's unmatched contribution to enhancing minority television station ownership.[56/] At present, HSN is affiliated with 36.7% of all minority-owned television stations in the country.[57/] As the Commission has recognized, these

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55/ Must Carry Report, 8 FCC Rcd at 5327 and Statement of Chairman Quello.

56/ Id. at 5327-5328.

57/ According to NTIA, there are 19 Black-owned television stations in the United States, seven owned by Hispanics and one owned by Asians. National Telecommunications and Information Administration, "Analysis and Compilation by State of Minority-Owned Commercial Broadcast Stations" (October 1993). Also, Stations WJJA(TV), Racine, Wisconsin and WTMW(TV), Arlington, Virginia, which are Black-owned, and KCRA(TV), Riverside, California, which is Asian-owned, also are affiliated with HSN but were not included in NTIA's

(continued...)

"minority controlled licensees of home shopping stations enhance the diversity of views and information available to the public."[58/]

Action in this proceeding which restricts the continued availability of a home shopping format would have a devastating adverse economic impact on minority station ownership, a result at odds with paramount national policy.[59/] Minority-owned stations would be faced with the choice of ceasing operations or of airing less attractive programming which other more established stations have rejected, reducing station revenue to a level where operations might not remain viable. Either result would disserve the public interest.

Finally, home shopping has facilitated the implementation of interactive video services. Prior to HSN's introduction of the home shopping format, broadcast television had been a one-way medium with viewers passively

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57/ (...continued)
most recent analysis of minority ownership. Thus, eight of the Black-owned stations, one of the Hispanic-owned stations and two of the Asian-owned stations are affiliated with HSN.

58/ Id. at 5328.

59/ See, e.g., Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982); Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. 100-202 (December 22, 1987); 47 U.S.D. § 309(i)(3)(A) (1988); see also Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990).

watching what appeared on the screen. Home shopping invited them to interact with their television sets. Ten years from now, today's interaction may well seem extraordinarily primitive. But if that occurs, it will be because home shopping paved the way for full interactivity. As then-Chairman Quello recognized:

> [Consideration of home shopping services] implicates a broader public interest question that goes to the heart of the future of broadcasting. We are constantly told of the brave new electronic future in which an array of services will be available on call directly to consumers. They include home shopping, home banking, pay-per-view events and a host of other interactive services...[I]t is evident that home shopping services are a precursor to this promising future in which consumers may use their TVs for more than just passive viewing.[60/]

Given the affirmative public interest benefits associated with home shopping programming, the constitutional need for a demonstration of clear offsetting harm is even greater than the already demanding "compelling governmental interest" standard. No evidence of such harm has ever been proferred, much less established, and thus there can be no permissible constitutional restriction of home shopping programming.

The First Amendment Precludes Restrictive Regulation of Televised Commercial Matter

Attached hereto is the Statement of Professor Rodney A. Smolla of the Marshall-Wythe School of Law at the

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60/ Notice, Separate Statement of Chairman Quello at 3.

College of William and Mary. Professor Smolla, a recognized and respected expert on First Amendment issues and concerns, has carefully reviewed the genesis of, and concerns expressed by, the Notice in light of constitutional mandates and concludes that regulatory restrictions on stations with a home shopping format cannot withstand First Amendment scrutiny.

He first notes that commercial speech is entitled to substantial First Amendment protection which approaches that traditionally accorded noncommercial speech. The erosion of the distinction between the two categories of speech is based upon judicial recognition that information conveyed by commercial speech, like that imported by home shopping services, is important and valuable to the public.

Professor Smolla further describes the tripartite test for First Amendment protection for core commercial speech, assuming arguendo, that it applies to the home shopping format. First, the speech must relate to lawful activity and not be misleading. Not even home shopping critics claim that this aspect of the standard is not satisfied.

Additionally, the governmental interest in regulating the speech must be substantial and the regulation must directly advance the asserted governmental interest

without being more extensive than is necessary to serve that interest.

Professor Smolla concludes that any proposed restriction on home shopping-formatted stations cannot be justified under this aspect of the standard. First, as discussed by Professor Smolla and confirmed herein, there is "no commercial harm purportedly caused by home shopping services."[61/] Thus, there is no governmental interest, much less a substantial one, that can be advanced by government regulation.

Instead, proposed restrictions on the home shopping format are based simply on subjective dislike of the format. However, Professor Smolla continues:

> [T]he imposition of restrictions on home shopping services based on that dislike would be purely content-based discrimination against speech, which is per se unconstitutional, even when the government is regulating purely commercial speech.[62/]

Professor Smolla thus concludes:

> Even if home shopping service programming were properly viewed as purely commercial speech, it would be protected from regulation based solely on its content absent evidence that the regulation is designed to remedy an identifiable harm. Because the home shopping detractors have not articulated, and cannot articulate, any real harm caused by home shopping services, such programming cannot be restricted solely on the basis of a dislike for

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61/ Smolla Statement at 18.

62/ Id. at 19.

its program content consistent with the First Amendment.[63/]

In other words, any Commission restrictions on the home shopping entertainment format would be clearly unconstitutional.

Home Shopping Programming is More Than Pure Commercial Speech

Throughout its Comments, SKC has demonstrated that there is no justification in law or policy for placing restrictions on commercialization or home shopping formats even assuming, arguendo, that the direct sales presentations contained in home shopping programming convert such programming services into pure commercial speech.

However, as alluded to in various portions of its Comments, SKC believes that the treatment of home shopping services as purely commercial speech is simplistic and inaccurate. The study conducted by Louis Harris and Associates, Inc. and submitted with the Comments of Home Shopping Network, Inc. demonstrates that viewers of home shopping services view the programming as containing elements of entertainment and informational programming, as well as sales. Thus, home shopping services provide value even beyond the legitimate and socially beneficial information that the Supreme Court has recognized that pure commercial speech (i.e., advertising) provides. When

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63/ Id. at 21.

properly viewed in this context, it becomes clear that home shopping services are an innovative, hybrid programming genre that, like all programming, suits the tastes of some and not of others. Therefore, while there is no legitimate basis to restrict home shopping services as pure commercial speech, it is a disservice and simply inaccurate for the Commission to fail to recognize that, in fact, home shopping services are not purely commercial speech, but constitute an entertainment format that should be accorded the same respect and regulatory treatment as any other more conventional entertainment format.

There is No Constitutionally Permissible Less Restrictive Regulation of Home Shopping Programming

At paragraph 7 of its Notice, the Commission asks how it might define an "excess" of commercial programming which must be subject to regulation.[64/] To ask the question is to emphasize the constitutional infirmities of any such restrictions. Has the Commission ever sought to define an "excess" of entertainment programming? On what constitutional basis can it single out commercial programming for such definitional distinction?

64/ The Notice also asks for comments on the mechanics associated with possible reimposition of commercial restrictions. Because SKC believes that any such action would be so clearly unconstitutionally, these Comments do not address that aspect of the inquiry.

There is none. There is no constitutionally permissible basis for the Commission to conclude, for example, that it is consistent with the public interest to air home shopping programming for 12 but not for 13 hours per day. The Commission has repeatedly refused to establish quantitative guidelines for the presentation of public service programming, based principally upon First Amendment objections to such rules.[65/] So long as stations continue to comply with their public service programming obligations -- and the Commission has concluded that stations with a home shopping format do so -- there can be no basis to limit the broadcast of their other programming. Moreover, as explained above, absent a substantial governmental interest, any such restrictions on constitutionally -- protected speech are incompatible with the First Amendment.

Conclusion

Commission action to limit television stations' broadcast of commercial matter in general, or adoption of a home shopping format in particular, would be content-based regulation clearly prohibited by the First Amendment. The Commission has never described any specific harms associated with the presentation of commercial matter, nor have home shopping's critics demonstrated why such programming

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65/ See, e.g., National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978); Office of Communications of the United Church of Christ v. FCC, 707 F.2d 1413.

requires governmental restrictions. There is simply no governmental interest in suppressing or restricting home shopping programming.

Television Deregulation's elimination of commercial guidelines fulfilled the Commission's expectations. It prompted innovation and led to institution of a new home shopping format, a pioneering application of interactive video which has proven immensely popular with the public and which provides acknowledged public service benefits. The availability of that format has produced the added, critically important benefit, of enhancing minority television station ownership. The consequent clear public interest in the continued unrestricted availability of the home shopping format precludes any contemplated return to pre-deregulation restrictions.

The vocal and unrelenting nature of home shopping critics' objections to this programming should not be allowed to obscure the complete lack of substance to their criticism. Subjective beliefs that there is something inherently "bad" about commercial matter, or that non-commercial entertainment, even if violent or sexually explicit, is more desirable than commercial matter, do not afford an appropriate policy or constitutional bases for Commission regulation. Commercial speech is entitled to constitutional protection, and home shopping's critics have

never demonstrated a substantial governmental interest in its suppression or restrictions on its broadcast.

Home shopping programming should be accorded the same regulatory treatment as other types of entertainment programming. It should not be restrictively reregulated. Accordingly, Silver King Communications, Inc. respectfully requests that the Commission terminate this inquiry without further rulemaking proceedings.

Respectfully submitted,

SILVER KING COMMUNICATIONS, INC.

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December 20, 1993

Exhibit No. 1

STATEMENT OF RODNEY A. SMOLLA

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Limitations on Commercial Time on Television Broadcast Stations	))	MM Docket No. 93-254

STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE
COMMENTS OF SILVER KING COMMUNICATIONS, INC.

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December 20, 1993

SUMMARY

These comments address the constitutionality of any re-imposition of limitations on commercial programming by, in particular, home shopping service broadcasters. Recent Supreme Court authority indicates that the government cannot regulate commercial speech as readily as it could in an earlier era. As the Commission recognized in its Notice of Inquiry, just last term, the Supreme Court admonished regulators not to place too much emphasis on any perceived distinction between commercial and noncommercial speech.

Even assuming home shopping service programming is primarily "commercial," however, it cannot be restricted consistent with the First Amendment absent a showing of real harm caused by the speech. No commercial harm caused by home shopping service programming has been identified. Indeed, to the contrary, the Commission itself found in the proceeding on whether home shopping service stations are entitled to must-carry status under the Cable Act, that home shopping service broadcasters serve the public interest, provide a public service to those unable to purchase goods in a more traditional manner, and have no detrimental effect on the public. The underlying impetus for this proceeding, the disdain for home shopping service programming by certain members of Congress and other home shopping detractors, simply does not provide a constitutional basis for restricting speech.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

PAGE

ADMINISTRATIVE PROCEEDINGS

SECONDARY SOURCES

STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE COMMENTS OF SILVER KING COMMUNICATIONS, INC.

On behalf of Silver King Communications, Inc. ("SKC"),[1] I am submitting this statement in response to the Commission's Notice of Inquiry in the above-captioned proceeding.[2]

I. INTRODUCTION

A. Qualifications

I am the Arthur B. Hanson Professor of Law, and the Director of the Institute of Bill of Rights Law, at the College of William and Mary, Marshall-Wythe School of Law. I write and speak extensively on constitutional law issues, particularly on First Amendment matters. My most recent book, Free Speech in an Open Society, was published in April 1992 by Alfred A. Knopf. My other books include: Suing the Press: Libel, the Media, & Power (Oxford University Press 1986) (which received the ABA Gavel Award Certificate of Merit in 1987); Law of Defamation (Clark, Boardman Publishing Co. 1986), a legal treatise; Jerry Falwell v. Larry Flynt: The First Amendment on Trial, (St. Martin's Press 1988; paperback edition by University of Illinois Press); and Constitutional Law: Structure and Rights in Our Federal System (co-authored with Professors Daan Braverman

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1/ SKC is the parent of the licensees of twelve television stations, all of which have a home shopping entertainment format and are affiliated with the Home Shopping Network, Inc.

2/ Notice of Inquiry, MM Docket No. 93-254, 7 FCC Rcd 7277 (1993) (hereinafter "Notice").

and William Banks) (Matthew Bender & Co. 1991), a law school casebook.

B. Background

On July 19, 1993, the Commission found that television stations that are predominately utilized for the transmission of sales presentations or program length commercials ("home shopping service broadcasters") cause no discernable harm to the public and, in fact, serve the public interest.[3/] Despite this unequivocal finding, the Commission initiated this proceeding to determine "whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations," particularly home shopping service broadcasters.[4/] This inquiry appears to have been prompted, in part, by "congressional debates on the 1992 Cable Act [which] reflected a . . . generalized concern with the issue of commercialism in broadcasting."[5/] This context is telling.

3/ Report and Order in the Matter of Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5321, 5326, 5328 (1993), petition for reh'g pending (hereinafter "Report and Order").

4/ Notice at 1. This raises the preliminary question whether home shopping service stations, which as Chairman Quello recognized "provid[e] a home shopping service," see Report and Order, 8 FCC Rcd at 5335 (separate statement of Chairman Quello), are properly viewed as broadcasting "commercial" programming in the traditional sense.

5/ Notice at 2.

In 1992, various legislators sought to amend the must-carry provisions of the proposed Cable Act to deny home shopping service broadcasters the mandatory cable carriage afforded other similarly situated over-the-air broadcasters.[6/] The primary proponent of the Senate amendment was Senator John B. Breaux. Senator Breaux never sought to conceal the disdain for home shopping service broadcasters that motivated his proposed amendment:

> [T]he FCC has really dropped the ball in allowing at least 100 UHF stations to become "broadcast stations" when in fact they do not meet the public interest test of the Communications Act of 1934 . . . . I do not think the FCC should have allowed [any home shopping format station] to become a broadcast station under the meaning of the Act . . . . Home Shoppers [sic] Network, which has acquired all of these broadcast stations, I would submit is not meeting these public interest tests, and as a result should not have the benefit of

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6/ The House version of the bill included a similar provision:

> (f) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS. -- Nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or videoprogramming service that is predominately utilized for the transmission of sales presentations or program length commercials.

H.R. 4850, 102d Cong., 2d Sess. § 614(f) (1992).

being a must carry with regard to cable operators.[7]

Although Congress rejected the Breaux Amendment and its restrictive concepts, the compromise position ultimately approved by both houses of Congress as Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992[8] nevertheless subjected home shopping service broadcasters to a burden imposed on no other broadcaster. In particular, Section 4(g) required the Commission to conduct an extraordinary proceeding to determine whether home shopping service broadcasters as a class are serving the public interest, convenience and necessity. Congress required the Commission to undertake this unprecedented proceeding notwithstanding that the Commission previously had granted and renewed licenses to scores of home shopping format broadcasters based on individualized determinations that those broadcasters were, in fact, serving the public interest, convenience and necessity. Only if the Commission once again determined that such stations were operating in the public interest, convenience and necessity, would they be eligible for mandatory cable carriage. Congress made no attempt to hide

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7/ Executive Session: Mark-Up Hearings on S-12 Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 102d Cong., 1st Sess. 20-22 (May 14, 1991).

8/ Pub. L. No. 102-385, 106 Stat. 1460, 1475 (1992) ("the Cable Act").

the fact that this extraordinary burden was being imposed on home shopping service broadcasters not because they had caused any identifiable harm to the public but solely because of a paternalistic dislike of their programming format.

During the Commission's congressionally-compelled re-evaluation of the home shopping service industry, hundreds of commenters submitted both formal and informal comments attesting to the public service performed by home shopping service broadcasters. Based on the substantial record before it, the Commission concluded tnat home shopping service stations are operating in the public interest, convenience and necessity. Equally important for purposes of this inquiry, the Commission specifically found that the extensive record before it "reflects no detriment to the public caused by the [] existing program operations" of home shopping format broadcasters.[9/] Accordingly, the Commission qualified home shopping service stations for mandatory cable carriage pursuant to section 4(g) of the Cable Act.[10/]

9/ Report and Order, 8 FCC Rcd at 5328.

10/ Because the Commission concluded that home shopping service broadcasters are serving the public interest, it did not have to decide whether the Constitution would permit the Commission to deny a broadcaster a benefit based exclusively on the content of its programming. However, the Commission did recognize that "the failure to qualify certain licensed stations [for must-carry status] based upon their programming decisions would place the content neutrality of (continued...)